J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 24, 26, 29, 30, 31 & 32 OF 1971

Before: The Hon. Mr. Justice Smith - Presiding
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Hercules

EATON BAKER
WINSTON WHITE
PAUL TYRELL
SYLVAN JOHNSON
WINSTON BROWN
ALPHANSO PHIPPS v. REGINA

A.C. Lee Hing for applicant Eaton Baker
Noel Edwards, Q.C. for applicant Winston White
W. K. Chin See for applicant Tyrell
J. Leo-Rhynie for applicant Sylvan Johnson
Roy Taylor for applicant Winston Brown
H. Edwards, Q.C. and A. Campbell for applicant Alphanso Phipps
R.O.C. White, Q.C., Karl Atterbury and Velma Hylton for the Crown.

1972 - February 28, March 1, 2, 3 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 21, 22, 23, April 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, May 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, July 31.

SMITH, J.A.:

The applicants were each convicted by a jury on March 3, 1971, in the Home Circuit Court of the murder of Reginald Tate after a trial lasting some thirty-one days. They were tried jointly with seven others, two of whom were acquitted at the end of the prosecution's case on the directions of the learned trial judge, Parnell, J., and the remaining five at the end of the trial.

The deceased Tate was, up to the time of his death, employed as a warder at the Hill Top prison at Bamboo in St. Ann. He and warder Wesley Miller were on duty at the prison on the night of November 26, 1969, when, between 8.30 and 9.00 o'clock, there was a riot among the prisoners. A number of them armed themselves with machetes and attacked the two warders who were the only officers on duty at that time. Both were very seriously injured. Tate died the same day from shock and haemorrhage resulting from multiple incised wounds. Among other injuries, he had about three incised wounds of the vault

of the scalp from six to eight inches in length. These caused multiple fractures of the vault of the skull. His brain was "torn up", resulting in cerebral haemorrhage. His left hand was almost severed at the wrist.

The Hill Top prison was described in the evidence as an "open" prison for first offenders. The warders are not armed. The compound was, at the time, fenced with wire instead of walls and the prisoners slept in dormitories and not in cells. There was one main building which, as described, had a central circular area or rotunda, referred to in evidence also as "the archway". There was a large circular column in the centre of the rotunda. Radiating from the rotunda, rather like the spokes of a wheel, were three dormitories in which the prisoners slept, the dining and kitchen area, offices and a sick bay - a total of six "spokes". These all opened on to the rotunda. The dormitories were named Cornwall, Middlesex and Surrey (after the three counties of this country) and were juxtaposed. There were no doors to the dormitores. Entrance to, and exit from, them was through the rotunda. The dormitories in relation to the rotunda were, apparently, so designed that it was possible to see into all three of them from a central point near the column of the rotunda. As far as the evidence shows, there was one gateway to the main building from outside. This was in an area between Cornwall dormitory and the office and led by way of a passage to the rotunda. This was referred to in evidence as the main entrance or gate to the rotunda.

Before the prisoners retired to their dormitories for the night they attended devotions at 8.00 o'clock in the rotunda. They were then searched by the warders on duty and counted off before they went to their dormitories. On the night of November 26, 1969, devotions were held, the prisoners were searched and counted off by the deceased and warder Miller and they retired to their dormitories. As was customary, the dormitories, rotunda and the premises generally were well lit. There were a total of 80 or 81 prisoners in the three dormitories, including the applicants and those who were tried with them. Soon after the prisoners went to their dormitories there was

an incident in the Surrey dormitory involving two prisoners named Blissett and Nisbeth. The two warders were then in the rotunda. There were a table and a chair in the rotunda near the central column, apparently for the use of the warders. These were in the general area of the rotunda facing the three dormitories. The deceased went into the Surrey dormitory to investigate the 'Blissett' incident, as it was called during the trial. There is a conflict of evidence in the prosecution's case as to whether warder Miller accompanied the deceased into the Surrey dormitory at this time. Miller insisted that he did not go. It is shortly after the 'Blissett' incident, and after the deceased had returned to the rotunda, that the riot of prisoners took place. It is not disputed that prisoners rushed from the dormitories armed with machetes and attacked the warders. As already stated, both were seriously injured. A number of prisoners were also injured, including two who were prefects. The deceased was found afterwards lying on his back in the dining (or mess) hall in a pool of blood. He was alive but died soon after in hospital.

The deceased was found by a witness Samuel Francis, who had gone to the prison between 9.00 and 10.00 o'clock from the district of Bamboo where he lived, after a report was made to him. Mr. Francis found the main building on fire. Prisoners were seen by him scattered all around the compound and a number of them went or were taken to the Bamboo police station where they were taken into custody. The store room in which agricultural tools were kept was found open. These tools, including machetes, were used by the prisoners on the prison farms. A number of machetes were missing from the room. Later when Detective Inspector James Robinson arrived he found that the offices and dormitories were badly burnt; beds in the dormitories were burnt and in the offices records and a wireless set and radio were also burnt. Panes of glass were missing from windows in all of the dormitories. There was evidence that some of the prisoners broke these windows to leave the dormitories during the riot.

It is against this background that the applicants and others were charged and tried for the murder of the warder, Reginald Tate.

It was not contended that they were the only ones responsible for his death but witnesses were called who implicated the applicants and five of the others charged in the events leading up to and in the actual attack upon the deceased. There was no evidence against the two who were acquitted at the end of the prosecution's case. Of necessity, apart from warder Miller who survived, all the alleged eye witnesses were prisoners from the institution. There were six of them and included three prefects. Each of the applicants as well as Glenis Stoner, Frederick Brown and Tony White was said by one or more witnesses to have been armed with a machete and to have chopped the deceased. The remaining two, Junior Thompson and Ivan Williams, were said to have been armed with machetes at or about the time of the attack, but were not seen chopping the deceased. The defence in each case was a denial of involvement in the attack upon the deceased, thus, the main, and perhaps only, issue for the jury's determination was whether the evidence of the eye witnesses satisfactorily identified the applicants and others as participants in the attack upon the deceased. As already stated, the applicants alone were convicted.

The grounds of appeal of the applicants Baker, White, Johnson, Phipps and, to a lesser extent Tyrell, made grave allegations against the trial judge in his conduct of the trial. He was accused, inter alia, of arbitrary conduct which militated against a fair trial; of abdicating his position as judge, assuming the role of a haughty school master dealing with wayward students, entering the arena thereby preventing a proper presentation of the applicants' case and was chief counsel for the prosecution; of failing to hold the scales evenly by refusing to allow in evidence for the defence on the same basis on which it was permitted for the Crown, by his attitude to counsel for the defence when compared with his attitude to counsel for the Crown and by the general tenor of his summing up which, it was alleged, amounted to a speech for the prosecution; of frequent interruptions at critical aspects of the cross-examination which blunted its effectiveness and tended to rehabilitate the witnesses in the eyes of the jury; of refusing to hear counsel who wished to be heard on particular points;

of reminding witnesses in cross-examination of their evidence in chief; of allowing inadmissible evidence on improper considerations. Such of these allegations as were pursued were argued by Mr. Noel Edwards, on behalf of those applicants who made them, under the general submission that the conduct of the trial militated against a fair trial of the applicants.

Mr. Noel Edwards began by making reference to "guidelines" which were laid down by the learned trial Judge on the third day of the trial. The guidelines are as follows:

> " (1) Where an accused is represented by two counsel, a senior and a junior - as is happening in this case - the senior has no right without the leave of the court to intervene and take part in the particular exercise then being pursued. That is to say, if the junior counsel is cross-examining and an objection is taken to a question by counsel for the prosecution, the answer to the objection must be handled by junior counsel and the senior who is leading the junior has no absolute right to be heard unless the judge grants leave. A fortiori, where counsel who wishes to intervene is representing another accused he has no right to be heard on the point unless leave is granted. If he insists to be heard when the judge has directed otherwise and thereby obstructs the proceedings of the court, he is in contempt.
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> (2) No counsel in any proceeding where there are several counsel representing different interests has any right to demand to be heard where the judge is dealing with a matter raised by another counsel in the case. In other words, counsel cannot make himself amicus curiae without the court's approval. If the judge refuses to hear him then he could still raise the matter, if relevant, when his turn comes to cross-examine, to make his submission or put his case as the matter may be. It is the duty of counsel to obey the ruling of the court and while he is required to show courte

and tact in the performance of his duties he must display sound judgment and good sense if he is to give effective assistance to his client and discharge that duty to the court which his position as counsel demands.

(3) During a trial a judge is required among other things -

(a) to see that advocates behave themselves and keep to the rules laid down;

(b) to exclude irrelevances and discourage repetition;

(c) to prevent any unnecessary time-wasting by counsel or by any party in the case and generally to keep complete control of the proceedings before him;

(d) it is the duty of the judge, among other things, by wise intervention to ask such questions as may be necessary to clear up any point that might have been overlooked, left obscured or which he thinks may be appropriate to assist the jury in coming to a correct decision."

These were laid down following an incident in the trial when Mr. Horace Edwards, the senior of all the counsel appearing at the trial, was called upon to show cause why he should not be punished for contempt of court. The incident arose during the cross-examination by Mr. Noel Edwards of one of the eye witnesses, Adolph Blake. Blake admitted during cross-examination that he had been convicted for the murder of his cousin, Owen Edwards. He admitted to Mr. Noel Edwards that he loved his cousin. Mr. Noel Edwards then asked him:

" Q. And is it correct to say that Owen Edwards, whom you loved, perhaps dearly, was destroyed by you with a sharp cutting instrument?"

The following exchanges follow this question as appear on the record:-

"HIS LORDSHIP: No, No! I am not allowing that. No Mr. Edwards, no.

Q. M'lord, I would like to find out - might I find out this ---- ?

HIS LORDSHIP: Just wait a second. You were saying something

Mr. Horace Edwards?

MR. HORACE EDWARDS: Before your Lordship rules on that I would like to be heard.

HIS LORDSHIP: And Mr. Noel Edwards is cross-examining and you want to be heard?

MR. HORACE EDWARDS: I would like to be heard before you rule on what you are about to say to Mr. Noel Edwards. Hear me out. The reason why I have the right to be heard is that counsel is not supposed to sit still here and not assist the court when proper assistance can be given. You know the law on that."

The trial judge thanked Mr. Horace Edwards but said he did not need his assistance as he could get all the assistance he needed from Mr. Noel Edwards "who is in charge of the witness." Mr. Horace Edwards insisted that he had a right to be heard. The judge asked him to take his seat. He insisted on interposing to bring a relevant authority to the court's attention. He was ordered to take his seat and when he, apparently, disobeyed he was called upon to show cause. Mr. Horace Edwards did not appear with Mr. Noel Edwards for the same accused. In fact he appeared for the accused Howard Alcock who was discharged at the end of the prosecution's case as there was no evidence at all against him. It is to be observed that when Mr. Horace Edwards intervened the trial judge has already ruled against the question and was not about to say anything to Mr. Noel Edwards as Mr. Horace Edwards said.

In his submissions to us, Mr. Noel Edwards was content with merely reading the guidelines. He did not seek to challenge them in any way. It is, therefore, unnecessary for us to express any opinion about them. The guidelines were cited in the grounds of appeal to "buttress" the allegation that "the learned trial judge displayed a pattern of conduct throughout the trial which militated against a fair trial." It has not been demonstrated to us, nor have we seen anything in the record to justify the allegation, that imposition of the guidelines prejudiced a fair trial of the accused. This was a case in which

twenty-six counsel appeared, two being assigned for the defence of each of the thirteen accused. It was the greatest number of counsel ever to appear at a trial in this country, and many of them were very junior. Because of their number and the relatively narrow issues which had to be determined by the jury the danger of needless repetition of argument and of questions in cross-examination and of the trial getting out of hand was real. It was the judge's clear duty to control this as far as was possible. What was in his mind when he imposed his guidelines can be gathered from the following statement made by him after he had read them to counsel:

> " Counsel must remember that if he is aggrieved by any ruling of the judge during a trial he has his remedy elsewhere, namely, to appeal to a higher court. If the judge does not insist that his ruling be obeyed and, for instance, if the attitude that was taken up by Mr. (Horace) Edwards, which I think is not correct, is to be pursued to the limit then what may happen is that every other counsel in this case can insist to be heard, not only on the point, but on any corollary flowing from that point, and then the jury and I would be here until next year listening to objections, comments, rejoinders - we would never be finished; the whole thing would end up in chaos and confusion and the jury would not be able to return a true verdict."

The purpose intended to be served by the imposition of the guidelines was, of course, perfectly proper. As we have said, no injustice was, in our view, caused by their imposition.

Mr. Noel Edwards turned next to interruptions by the trial judge. He pointed out that the evidence in the case occupied 1,353 pages of the record and that only approximately 146 pages were free of interruptions. He said that this would tend to suggest that the trial judge played too active a role in the proceedings touching upon the evidence and cited R. v. Jones et al - Times Newspaper, November 23,1961. The court voiced its suspicion that the computation was made on the basis of the number of pages on which the words 'His Lordship' did not appear. Mr. Edwards admitted that this was so. It was pointed out to

him that this could not be a proper basis as there were several instances in which 'His Lordship' appeared where the judge was making rulings, giving instructions for the adjournment of the court, was invited by counsel to intervene and many other instances which could not properly be called interruptions. Mr. Edwards was invited to classify the interruptions and to base his argument only on those considered to have been unnecessary. He agreed and further argument on this point was adjourned. When the argument was resumed many days later, Mr. Edwards submitted that there were twenty-one instances where the interruptions were compellingly adverse to the applicants. Of these we considered that in seventeen cases the complaint was without merit. We now deal with the remaining four.

During the cross-examination of the witness Adolph Blake by Mr. Roy Taylor, the witness was reminded (at p. 297 of the record) by Mr. Taylor that he had admitted during the cross-examination by Mr. Noel Edwards that at the preliminary enquiry held at Browns Town into a charge of wounding Warder Miller, he had named six men as having machetes chopping Warder Tate. The witness admitted that he had. The Judge intervened to remind the witness that he had told the jury earlier in the case that at the preliminary enquiry at Browns Town, he was under orders from the Clerk of the Courts to stick to the incident relating to Warder Miller. This evidence had been given by the witness during the cross-examination by Mr. Noel Edwards in relation to the same matter in order to explain that whatever he said at the preliminary enquiry at Browns Town related to the case of Miller and not of Tate. It was submitted that this intervention by the Judge was unwarranted and was adverse in the sense that Blake had given unequivocal evidence that the six persons he named at Browns Town were chopping Tate. We think that this criticism is justified. No injustice, however, resulted from the intervention as Mr. Taylor was merely seeking to establish that the witness had admitted naming six persons as having machetes in the rotunda and this he achieved immediately after the intervention. It was the witness who had (on p. 297) introduced the question of the chopping of Tate.

The next interruption about which we think there was justifiable cause for complaint arose during the cross-examination of Warder Miller by Mr. Chin See. The witness had admitted that at the preliminary enquiry in this case he had said in cross-examination that he really did not know who chopped Tate, whereas at the trial he named three of the applicants as having done so. As an explanation of this contradiction he said that he did not understand the question to which he gave that answer at the preliminary enquiry. Mr. Chin See was endeavouring to show by cross-examination that the question to which he gave the answer was not capable of being misunderstood and he was also seeking to discover when it was that the witness realised that he did not understand the question. The judge intervened to direct Mr. Chin See's attention to a passage in the witness' deposition which preceded the passage about which the witness was then being questioned. Mr. Chin See said he had seen it. The judge asked whether in view of that passage Mr. Chin See was still persisting with that aspect of his cross-examination. Mr. Chin See replied that he was, gave his reason and continued his questions on the same topic. The learned judge called for the depositions and said that as judge he will put the proper perspective to the jury. The depositions were shown to the witness. Mr. Chin See observed that unless there was a correction on the depositions, it ought not to be shown to the witness. After further exchanges between the judge and Mr. Chin See in which other counsel took part the judge stated that the impression Mr. Chin See's line of cross-examination was creating on the jury was that at the preliminary enquiry the witness stated that he did not know who chopped Tate, whereas another part of the depositions said that he had named three persons who did it. It must be stated here that the depositions had not been tendered in evidence. Mr. Chin See said his purpose was to show the state of confusion in the witness at the preliminary enquiry where he gave certain names and also said that he did not know who did it. The judge then directed that the deposition be shown to the witness and the record (at p. 661) shows the following questions by the judge and answers by the witness:

" Q. Now, at St. Ann's Bay, you see that page there, at St. Ann's Bay, did you tell the Resident Magistrate, 'three of the prisoners chopped Tate', is it there?

A. Yes, sir.

HIS LORDSHIP: They are Winston Brown, Winston White and Eton Baker, that is what you told the Magistrate, and it is there?

A. Yes, sir. "

It was submitted that the trial judge was wrong in putting the depositions to the witness in these circumstances and that to have interrupted the cross-examination in this way was highly prejudicial to the case of those applicants whose names were called. On behalf of the Crown, it was contended that the justice of the case demanded that the impression of the cross-examination be corrected as soon as possible and it was not that the trial judge had entered the arena.

We can understand the learned judge's anxiety to correct what he regarded as a false impression which the particular line of cross-examination was creating but, in our view, he was quite wrong to read out the names from the depositions when the depositions were not in evidence. Though the depositions of almost all of the prosecution's witnesses were freely used during their cross-examination none of the depositions were tendered in evidence. It was quite clear that the several defence counsel had decided to make the fullest possible use of the depositions without actually tendering them in evidence. There is no objection to this course, provided the proper procedure was followed. We were, however, surprised to see from the record that it was commonplace throughout the trial for counsel to read out passages from the depositions, sometimes at great length. Though the learned judge was at pains from time to time to point out the proper procedure for the use of the depositions, we were more surprised to see instances where he, himself, offended against the proper practice and read from the depositions. One of those instances has given rise to the complaint now being discussed.

We do not agree that the disclosure of the three applicants' names by the trial judge was, in the circumstances, prejudicial to them. Counsel for the prosecution would, without doubt, have had the right

in re-examination to have the witness give the names he had called at the preliminary enquiry. (See R. v. Oyesiku (1972) Crim. L.R. 179). This was conceded by counsel in his argument. Indeed, this matter arose earlier during the cross-examination of the witness by Mr. Noel Edwards when an objection was taken by junior counsel for the prosecution. The learned judge is recorded as having said then (at p. 601 of the record) that he would allow the witness to be re-examined on the point. It would have been more in keeping with proper practice for him to have waited until then rather than by intervening to do it himself.

The third interruption which calls for comment occurred during the cross-examination of the prosecution witness Berris Anglin by Mr. Taylor. It was suggested to the witness that at the preliminary enquiry at Brown's Town into the charge of wounding Warder Miller he (the witness) had not called the name of Winston Brown. The witness said he had. Counsel asked him whether he cared to refresh his memory from his deposition and the witness said, yes. The trial judge intervened to ask the witness whether he had seen Winston Brown chop Miller, to which the witness replied that he did not remember. It was submitted that this interruption was most adverse to the objective of counsel and had no relevance whatever to the context of this incident. It was also said that it had the added effect of hampering counsel in the pattern of his cross-examination. The intervention may have been adverse in the sense that it sought to put an explanation into the witness' mouth for his not calling Winston Brown's name. The witness did not directly accept the invitation and, in any event, he claimed that he referred to Winston Brown at the preliminary enquiry though by the name Trevor Brown, by which name, he said, Winston Brown was also known to him. In the end, we do not think that any real prejudice resulted from the intervention.

Lastly, we were referred to an incident which occurred during the cross-examination by Miss Beverley Walters, of the prosecution witness Delroy Brooks. This was not really an interruption. Miss Walters suggested to the witness that a statement made by him at the trial concerning the applicant Eaton Baker had not been made

by him at the preliminary enquiry into the charge. The witness maintained that he had made it. Miss Walters invited the witness to look at his deposition to assist his memory. He replied that he did not want to assist his memory. Miss Walters then asked the judge to allow the witness' deposition to be shown to him. She was asked for what purpose. She said it was to satisfy the witness or herself and the court, in the interest of justice, that the witness had nowhere at the preliminary enquiry mentioned the particular matter concerning Eaton Baker. The judge asked whether she conceded, "that the object of facing a witness with the depositions he gave to the Resident Magistrate is for the purpose of contradicting him on what he said there compared with what he is saying here." Miss Walters agreed. The learned judge then asked whether she submitted that she can use the deposition at the trial to contradict the witness upon what he did not say at the preliminary enquiry or was she seeking to use it for the purpose of basing an argument to make a comment later in the trial. Miss Walters replied in the negative and added that: "It is that the witness has given sworn evidence here that he said something there which is nowhere there - nowhere to be found in the depositions." She said that the witness said it was there (in the depositions), and it was for this purpose to contradict him on "this important point" that she made her application. The judge said that she would have to show the witness something which he had said there (in the depositions) in order to contradict him. He said he would, however, allow the witness, if he wanted, to look at the deposition not for the purpose of contradicting him, but to refresh his memory on the point and that Miss Walters could use it as a basis for an argument, "that it is an important piece of evidence which was not said." He then left it to the witness to say whether or not he wanted to look at the deposition, telling him that he was not going to compel him to do so if he did not want to. The witness stated that he did not want to look at it. It is this about which complaint is made. It was submitted that the trial judge was clearly wrong in not allowing the deposition to be put to the witness as he had previously and

subsequently allowed depositions to be put for a similar purpose. It was submitted, further, that ss. 17 and 18 of the Evidence Law (Cap. 118) allowed the deposition to be put in these circumstances to show that the witness is now saying something not in the deposition. Reference was made to R. v. Ronald Johnson et al (unreported) a judgment of this court, delivered on May 31, 1968 and Alexander v. R. (1969), 14 W.I.R. 466. In the former case, the trial judge was held to have erred in restricting the cross-examination of a witness when he ruled that counsel could not cross-examine as to a previous statement given by the witness, save for the purpose of contradicting him. The court accepted a submission that s. 18 of the Evidence Law expressly provided for the cross-examination of a witness as to a previous statement made by him in writing without the writing being shown to him and without necessarily proceeding to contradict the witness by the writing; that the cross-examiner may be content to accept the answers given by the witness in cross-examination and the preliminary questions, to elicit the preliminary answers which may either be accepted or form the basis for a contradiction ought not to be disallowed. Alexander ~~v.~~ R. (Supra) at p. 471, merely refers to the fact that statements made by a witness at the trial were not recorded in her deposition though she insisted that she had made the statements in the court below. The circumstances in which it became known at the trial that the deposition did not contain the statements in question were not stated in the judgment, so this case is of no assistance on this point.

In our view, a witness' deposition cannot properly be used for the purpose of refreshing that witness' memory in court. We observe that this was permitted and done time and again during the trial. It was this that the learned trial judge told Miss Walters that he would allow, but, apparently, since a witness cannot be compelled to refresh his memory, the judge felt that he could not compel the witness to look at the deposition. In the Ronald Johnson et al case (supra), the witness was not allowed to answer the questions about what he had not said in his previous statement. In this case that stage had been

passed and the witness claimed that he had said at the preliminary inquiry what it was suggested he had not said. It would have been permissible at this stage for counsel to have had the witness look at his deposition and he could then have been asked whether having seen it he adhered to his answer that he had made the statement at the preliminary inquiry. It appears that it was for this purpose that Miss Walters at first asked that the witness be shown his deposition, since he had declined her invitation to use the deposition to assist his memory. It seems clear, however, that her final reason for wanting the witness to be shown his deposition was to contradict, not the statement at the trial that he is said not to have made at the preliminary inquiry but, his positive statement in cross-examination at the trial that he had made the statement at the preliminary inquiry. Though the deposition would not be conclusive of the fact that the statement had not been made, yet we think that counsel was technically entitled to contradict the witness in the way she proposed. The learned trial judge was, therefore, in error in not permitting her to do so. As we have said, this was not an interruption and any prejudice that may have resulted from the trial judge's ruling would have affected the applicant Eaton Baker, for whom Miss Walters appeared, and not the trial as a whole. Reliance was placed on this complaint during the argument of Eaton Baker's application, so we shall deal with it finally when we come to consider the submissions made on his behalf.

The final complaint made in relation to the conduct of the trial was an allegation of instances of discourtesy to counsel which, it was contended, militated against a fair trial. Our attention was directed to four occasions where it was said that the trial judge was grossly discourteous to, or made remarks disparaging of, counsel - two occasions each in respect of two counsel. We prefer to describe the manner of the judge on these occasions as brusque and chiding. Acts of discourtesy to counsel, however, is not a ground on which the verdict of a jury can be set aside unless they were so many and so contemptuous and disparaging of counsel as was likely to prejudice the case for the defence in the eyes of the jury. We are in no doubt

that the instances to which we have been referred, assuming them to be discourteous, could have had no prejudicial effect. These were only four instances in a very long trial and they occurred at fairly widely separated intervals. One counsel gave as much as he got on each occasion and it is significant that he is the only one whose client has not complained about the conduct of the trial.

We have dealt with all the arguments addressed to us on the general ground of complaint relating to the conduct of the trial. It will be seen at once that we were invited to consider a relatively small fraction of the allegations in the grounds of appeal under this head of complaint. The rest were either expressly abandoned or not pursued. We think it right to say that we deprecate the making of grave charges against the conduct of a trial judge, as was done in this case, without proper thought being given to the question whether or not there was material on which those charges could be supported. We were far from being persuaded that the matters on which we were addressed, either cumulatively or separately, rendered the trial unsatisfactory or resulted in the applicants being deprived of the substance of a fair trial. This gound of complaint, therefore, fails.

Common to all the applications were grounds of appeal which complained of misdirections on the inconsistencies and contradictions which arose on the evidence. In all, except the application of Winston Brown, the stated grounds were that :-

" (a) the learned trial judge inadequately and wrongly directed the jury in the law on how to deal with discrepancies and inconsistencies"; and

" (b) the jury were not adequately directed on the discrepancies and inconsistencies that arose on the evidence, and were not adequately assisted on how to apply the proper law to them."

In the case of Winston Brown, the complaint was that -

" The learned trial judge failed to direct the jury to disregard the evidence of the witnesses Adolph Blake, Wesley Miller and Berris Anglin, in view of

> "the numerous material contradictions, discrepancies and inconsistencies in and between their evidence at the trial, their depositions, and, in the case of Adolph Blake, his statement to the police."

It was contended that where a witness is proved to have made inconsistent statements on a material issue in a case, the jury should be directed in accordance with the principle laid down in R. v. Leonard Harris, (1927) 20 Cr. App. R. 144, 148 and 149, namely that -

> " the effect of the previous statement, taken together with the sworn statement was to render (the person) a negligible witness and that the jury must consider whether the case was otherwise and by others made out."

It was submitted that this principle must now be regarded as a rule of law so as to impose a legal obligation on a judge to give this direction. No authority was cited in support of this submission and it was made in the face of authorities to the contrary which, however, were said by counsel to be wrong. In Cross on Evidence (3rd Edition) p. 209, the learned author says :-

> " Language is sometimes used which suggests that the jury is bound to disregard the entirety of the testimony of a witness who has previously made a contradictory statement, unless he can give a satisfactory explanation of his conduct, but it is doubtful whether this can be treated as a rule of law because everything depends upon the circumstances of the case."

The point has been raised in the Court of Appeal of Trinidad and Tobago more than once. In Mills and Gomes v. R. (1963) 6 W.I.R. 418, Wooding, C.J., said, at p. 420 -

> " On such evidence it was right and proper for the learned judge who presided at the trial to direct the jury as he did that 'where a witness makes two conflicting

statements on oath - each statement on oath - one diametrically opposed to the other, unless you get a satisfactory explanation of the contradiction, it is your duty to completely discard the evidence of the witness and certainly to disregard it.'

In so saying he adopted the direction which was given and approved in R. v. Harris (1927) 20 Cr. App. R. 144. But in view of certain arguments addressed to us, we ought perhaps to add that Harris' case prescribed no rule of law. It simply provides guidance to a judge as to the nature of the direction which he ought justly to give to a jury in the circumstances mentioned."

In the same Court, In Slinger v. R. (1965) 9 W.I.R. 271, Phillips, J.A. said, at p.276:

" Reliance was placed on the much abused case of R. v. Harris (supra), for the proposition that it was the duty of the trial judge as a matter of law to direct the jury that they should reject not only the evidence of the witness in relation to which the alleged discrepancy existed, but the whole of his testimony in connection with the stabbing incident, which was the matter directly in issue before the jury. In our judgment, Harris' case is manifestly no authority for this contention which we consider to be wholly devoid of substance."

It is sufficient for us to say that we respectfully agree with the opinion of the Court of Appeal of Trinidad and Tobago on this point.

It was argued, in the alternative, that, if there is no rule of law as contended, it is a rule of practice that has become obligatory on a trial judge. It was said that this contention is borne out by the passage from the Mills & Gomes case cited above. In the further alternative, it was argued that the judge has a duty to tell the jury that the evidence ought not to be accepted in the absence of reasonable explanation and that the standard of proof of reasonableness of the

explanation is the same as the standard required for proof of guilt.

As long ago as 1809 the purpose and effect of proving that a witness has made a previous inconsistent statement and the respective functions of judge and jury relative thereto was stated by Lord Ellenborough, C.J. In R. v. Teal 11 East 307 Lord Ellenborough said, arguendo, at p.311:

> "But though a person may be proved on his own shewing, or by other evidence, to have foresworn himself as to a particular fact; it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the Judge, it only goes to the credit of the witness, on which the jury are to decide."

In our view, the position is still the same today. The purpose of proving that a witness has made a previous inconsistent statement is to discredit his evidence in the eyes of the jury. It is the jury, and they alone, as the judges of fact who must decide whether the witness has been discredited and to what extent. No case has as yet altered this position.

The context in which the directions were given and approved in the Leonard Harris case is sometimes over-looked. It was a case of incest in which a father was charged in respect of his daughter. She incriminated him in a statement to the police but at the trial denied that the act had been committed. She was allowed to be cross-examined upon her previously made contrary statement. She admitted making the statement but denied that its contents were true. It was in this context that the jury were directed that the effect of the previous statement, taken together with the sworn statement, was to render her a negligible witness. This is the aim when an adverse witness is cross-examined - to nullify his evidence. But it is still a matter for the jury to say whether the aim has been achieved. The judge was, in the circumstances, bound to direct the jury that they must consider whether

the case was otherwise and by others made out. The girl's evidence at the trial did not implicate her father, so he could not have been convicted in the absence of other evidence. There is nothing said in the case to suggest that the jury were obliged to accept the judge's directions as to the effect of the previous statement and could not have believed her and acquitted the father.

That the passage in Mills & Gomes v. R. (supra), on which reliance was placed, did not seek to impose any obligation on a trial judge, as contended, is made clear in Daken v. R. (1964)7 W.I.R. 442. Complaint was made in that case that the trial judge should have directed the jury to disregard the evidence of the prosecutrix altogether because of two inconsistent statements she had made on oath; alternatively, it was said that he should have directed them that her explanation was unsatisfactory. Leonard Harris' case was relied upon. The Court of Appeal of Trinidad and Tobago referred to the last sentence in the passage cited above from the Mills & Gomes case and said, per Wooding, C.J., at p.444:

> "In our view, then, the direction to be given must have due regard to the facts of each case. No general principle can be enunciated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The judge may, and in cases such as we are now considering we think it is his duty to, give such directions as will assist the jury in assessing the credit-worthiness of the evidence given by the witness whose credibility has been attacked, but it can be but seldom that the circumstances will warrant his going beyond that. More especially, when a witness has given an explanation how he came to make the inconsistent statement by which his credit is sought to be impeached, it is for the jury to determine whether his evidence is acceptable when set against the inconsistent statement, due regard being had to the explanation proffered."

Time and time again during the argument before us when, what

what was said to be, a material inconsistency in the evidence of a witness was pointed out it was submitted that there was a duty on the trial judge to tell the jury that there being no explanation (if that was the case) the evidence of the witness on that point should be disregarded. After the evidence of the witnesses Blake, Miller, Anglin and Jonathan Smith and the summing-up in relation to that evidence had been examined it was submitted that because of the unexplained inconsistencies in their evidence the jury should have been told that their evidence should be disregarded and that they should look elsewhere for proof of the charge; further, that they should have been told that the explanations, when they offered any, were worthless and should not be accepted as reasonable. This is the same argument that was advanced in the Daken case (supra) and was based on the Leonard Harris and Mills & Gomes cases. If these submissions are right it would mean that the judge would be under a duty to decide questions of fact thus usurping the functions of the jury. We have no difficulty in rejecting these submissions as not supported by the authorities cited. We, however, agree that in a proper case, and this is one, the judge is under a duty to assist the jury in assessing the credit-worthiness of the evidence given by a witness whose credibility has been so attacked. This duty is usually sufficiently discharged in our opinion, if he explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of a witness at the trial and reminds them, with such comments as are considered necessary, of the major inconsistencies in the witness' evidence. It is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all can be placed on his evidence. There is, of course, the inherent power of a judge to withdraw a case from the jury if, in his view, the only witnesses in proof of a charge have been so discredited that no reasonable jury could safely rely on their evidence. If, however, there is evidence in the case in support of the charge, apart from the discredited evidence, on which it is open to a jury to convict, the judge, in our opinion, has no power and, thus, no legal duty to withdraw the discredited evidence from the jury leaving the other

evidence only for their consideration. All the evidence must, ex hypothesi, be left to the jury as judges of fact with a strong comment by the judge against the acceptance of the evidence which he considers to be so discredited.

In this case, the learned judge, in our opinion, adequately directed the jury on how inconsistencies in a witness' evidence should be regarded by them. In directing them on the matters affecting the credit to be given to the evidence of each witness, and immediately after dealing with demeanour, he told the jury, at page 1380 of the record:

> "And then last but certainly not least, madam foreman and members of the jury, you will take into account what is sometimes referred to as discrepancies. That is, a witness gives evidence at the preliminary examination and under oath he tells the resident magistrate something, an important point, and at the trial, the assize trial like this one, he varies from his story. If there is a substantial variation of what he told the magistrate and there is no explanation for it, there is no satisfactory explanation for it, you are the ones to be satisfied, then it would be open to you to say the witness is unreliable, you can't believe him at all. Why? Because, here again it is human experience, if you find a man one week ago on a particular point saying something and a few days afterwards, to use the language of the Jamaican, 'he turns his mouth', he is saying something else, then the person who is listening and who knows that he has said something previously different from what he is saying now is wondering whether you can believe him or not; whether you can rely on him. So it is on the same basis, the same reason that you apply in dealing with the question of discrepancies in this case."

On page 1381 he said:

> "Those are matters you take in looking at discrepancies. Is there a substantial variation from what he told the magistrate? If yes, is there any reason at all for it?

If no reason is given, no satisfactory reason is given, then you consider from that point how far, if at all, you would be able to accept him as a witness of truth."

Then a little more than half way through his summing-up, after dealing with an inconsistency in the evidence of the witness Miller and the explanation given for it, the judge told the jury at pages 1507, 1508:

"There you have it madam foreman and members of the jury, that is his explanation. Is it a reasonable one? Do you accept it?

Well, apart from this explanation, I should have told you- I don't think I did - that what is evidence in this case is what is told you from this witness box. What he is supposed to have said on another occasion whether Brown's Town or St. Ann's Bay is only relevant for the purpose of seeing how consistent he is with himself; whether he is contradicting himself; whether he is destroying his own credit as a witness, and the simple principle that I explained from Friday of last week, that where on the same point, the same matter, if a man tells two different things concerning the same thing, something must be wrong somewhere, either he has forgotten or he is lying or just unreliable, because, without being a deliberate liar a man can be unreliable. The fact of the matter is: what explanation or what has he got to say if he is found out now to be turning his tune, changing his tune, and he is unable to say why he is changing his tune."

The passage at p. 1380 is criticized in that it limits the previous inconsistent statements to the peliminary examination and thereby excludes the police statement of the witness Blake. It is true that in terms reference is made only to the preliminary examination but in the latter part of that passage and in the latter part of the passage on pp. 1507 and 1508 the words used are sufficiently general to include a previous unsworn statement. And when the alleged inconsistency in the police statement as against the evidence at the trial was dealt with in the summing up, it was done in the same way as were inconsistencies in the depositions. It might be observed here that the use of the

word "unreliable" in the passages cited has the support of the authority of Lord Parker, C.J., in R. v. Golder et al (1960) 3 All E.R. 457, where that word was used (at p. 459) in relation to previous statements inconsistent with evidence given at the trial.

A considerable amount of time was spent during the hearing of the applications while we were referred in detail to the inconsistencies which it was said arose in the evidence of the witnesses Blake, Miller and Anglin and the respects in which they contradicted each other. Detailed reference was also made to the manner in which the judge dealt with the evidence of these witnesses. It was submitted that in view of the inconsistencies and contradictions the judge should have directed the jury to disregard the evidence of the three witnesses and we were invited, in effect, to deal with the applications on the basis that the evidence of these witnesses should not have been taken into account by the jury. We have said that there was no such duty on the judge. We have, however, examined the evidence of each of these witnesses with great care in order to determine whether they were so discredited that no reasonable jury could safely have relied on their evidence, in which event a strong warning against acceptance of their evidence should have been given.

Adolphus Blake's evidence in brief was that he was by his bed in the Cornwall dormitory where he slept when he saw the applicant Sylvan Johnson and Junior Thompson enter the bathroom in that dormitory which was opposite to his bed. The deceased Tate was then seated at the table in the rotunda and Warder Miller was also in the rotunda going towards the Surrey dormitory. He said that Sylvan Johnson came from the bathroom with a machete held in a chopping manner. He, the witness, ran from the dormitory into the rotunda pursued by Johnson. As he ran he shouted to the deceased, warning him that "the boys them ah come with the machete." He ran to the warders' bathroom door which was almost directly across the rotunda from the Cornwall dormitory in order to escape. He was chopped by Johnson in his flight across the rotunda. At the bathroom door he turned and saw Glenis Stoner and all the applicants, except Phipps, chopping the

deceased. He entered the bathroom and escaped by breaking out through a window. This witness spent upwards of seven days in the witness box under cross-examination by eleven counsel, during which he was repeatedly taken over the same ground. Not surprisingly, many discrepancies appeared in his evidence between what he told one counsel on one point as against what he told another on the same point; but the more serious discrepancies appeared in a comparison of his evidence at the trial with the evidence that he gave in the two preceding preliminary enquiries. He was cross-examined exhaustively on his depositions, reliance being placed on his admissions since the depositions were not tendered. There were discrepancies as to the number of injuries inflicted on him by Johnson, the parts of his body on which they were inflicted and the place where he was when they were received. He said in cross-examination that he saw Miller being chopped as well as the deceased. He was lengthily cross-examined about this and a large number of discrepancies appeared in relation to whether he saw Miller being chopped at all and, if he did, where Miller was when he was being chopped and who chopped him. Of these, the most telling arose during the cross-examination of counsel for Johnson. He was asked and answered as follows (at p. 232 of the record):

"Dr. Edwards: Do you remember seeing Miller chopped?

"His Lordship: You saw when Miller got the chop?

"A.: Yes, sir.....

"His Lordship: That was at the same time that Tate was being chopped?

"A.: It is the same instant, you know, my'lord."

After this he said that Tate and Miller were chopped in the same riot, the same night; that Tate was chopped first and then Miller. On the following page (233) he said that while Tate was being chopped, he could see Miller. Then, during the cross-examination of counsel for Winston Brown (at pp. 290,291 of the record) he was asked:

"Q. .. ....You went on to say at St. Ann's Bay, did you not, 'I don't know where Miller was during the chopping'? I think you admitted that this morning?

"A. Yes, sir.

"Mr. Taylor: And in fact - correct me if I am wrong - I think you also admitted this morning that at St. Ann's Bay you

said: 'I did not see Miller when Tate was being chopped.' You remember that was put to you this morning by Dr. Edwards and your depositions were shown to you?

"A. Yes, sir."

In fact the witness had not made these admissions. He was asked by Dr. Edwards whether he had not said at the preliminary enquiry that he did not see Warder Miller when Tate was being chopped and his answer was that he did not remember. The matter was not then pursued (see pp. 233 and 234). However, in view of the affirmative answers which he gave to Mr. Taylor, he was asked (at p.291):

"Q. ...In view of what you have admitted saying at St. Ann's Bay on three occasions about not seeing Miller while this incident was occurring, will you now not ....admit that you did not see Miller while this incident was taking place in the rotunda?

"A. Yes, sir, I saw him, sir.....

"HIS LORDSHIP: You saw him there?

"A. Yes, sir.

"MR. TAYLOR: Let me give you an opportunity to explain the stand you took at St. Ann's Bay, where you on three occasions maintained that you did not see Miller. What is your explanation of this, Mr. Blake?"

"A. I don't understand that part, sir.

"Q. When you repeatedly said at St. Ann's Bay that you did not see Miller during the chopping of Tate, were you speaking the truth?

"A. Yes, sir."

In his summing-up, the learned judge dealt with this evidence briefly. He merely said (at p. 1510 of the record):

"He referred again to his evidence at the preliminary enquiry and he said:

'I did say I don't know where Miller was during the chopping. I did see Miller during the chopping of Tate.'"

This is criticised on the ground that these were two clearly contradictory bits of evidence which were merely referred to as evidence and not pointed out as contradictions and explained; that the judge did not analyse them and tell the jury how to deal with them. It was said, further, that the witness said that what he said at the preliminary enquiry was true; that this amounted to a clear falsehood without any explanation and required a clear direction on the

Leonard Harris & Mills & Gomes principles. What the learned judge said in this passage was really the substance of the evidence quoted. The bits of evidence quoted by the judge being "clearly contradictory" it surely was not necessary to tell the jury that this was a contradiction and there was really nothing to explain. The general directions given were a sufficient indication of how they should deal with the contradiction. Apart from testing the witness' credit generally, we understand from the argument that the significance of this evidence in regard to Miller is that the witness was saying that at the same time he viewed the scene in the rotunda and saw Tate being chopped, Miller was also being chopped. Hence any unreliability in his evidence regarding Miller would affect his credit regarding the deceased, Tate. The judge, no doubt, should have pointed this out to the jury, but we are unable to say that his failure to do so affected adversely the cases of the applicants. The significance of the inconsistencies in Blake's evidence relating to the movements of Miller and the attack on him must surely have been emphasised repeatedly in the final addresses of counsel.

Where we think the most important and serious inconsistencies occurred in Blake's evidence was in the cross-examination by the several counsel on the identity of the persons whom Blake said he saw chopping the deceased. Though his evidence as to this was not completely consistent, it was clear that he was saying that he had called the names of six prisoners at the preliminary enquiries at Brown's Town and St. Ann's Bay and in examination-in-chief at the trial as having machetes and chopping the deceased. Any doubts that existed as to what he was saying were removed by questions put to him by the judge during the cross-examination by Mr. Noel Edwards. He had, in answers to a series of questions by Mr. Edwards, said that the six persons named by him on each of the three occasions were: "the same six doing the act." The learned trial judge intervened and these questions and answers followd (at pp. 148, 149 of the record):

"HIS LORDSHIP: Doing what you say?

"A: Who I saw doing the act, sir.

The learned trial judge did not point out all the inconsistencies that arose on Adolph Blake's evidence and he was not obliged to do so. We think, however, that he reminded the jury sufficiently of the inconsistencies which arose in connection with the persons named by Blake at the trial as compared with those not named by him prior to the trial. These were the most material as they affected the real issue in the case - identity. It was pointed out that it was inaccurately stated in the summing-up that Blake had said that he did not know whether Griffiths' name was included among those named at Brown's Town and that he thought Lloyd Davis' name was included, whereas the witness had clearly admitted that those names were included. It was said that by this mistake the trial judge prevented the jury from appreciating that here was a fundamental contradiction in the evidence of Blake that destroyed him as a witness of truth. We do not agree that the error could have had this result. What was important, we think, was that the witness admitted excluding the names of three of the applicants. If, as he said, he named six om that occasion and three of those named at the trial were excluded, it would follow that he named three there who were not included among those named at the trial. It would not then matter whether the three named there in place of the three at the trial included Griffiths and Davis. Complaint was also made that the significance of the failure of Blake to call certain names in the police statement and at the preliminary enquiries was not dealt with by the judge. The members of the jury are presumed to be reasonably intelligent and, in our view, the significance of this aspect of the evidence could not have escaped them.

Wesley Miller's evidence in brief was as follows: After the Blissett incident he (Miller) went to the Cornwall dormitory and checked the muster. He had left Blake and Blissett with the deceased Tate in the rotunda, but when he was in the Cornwall dormitory he saw Blake in there. Blake spoke to him and after this the applicant Sylvan Johnson chopped at him (Miller) with a machete. He (Miller) ran from the dormitory into the rotunda. The deceased Tate was then sitting at the table in the rotunda and Blissett was there also. He saw

prisoners running from the dormitories into the rotunda with machetes. Of those on trial he saw Winston White, Winston Brown, Eaton Baker, Ivan Williams, Paul Tyrell and Sylvan Johnson with machetes. He felt chopping blows on his head but did not see who was chopping him. He ran from the rotunda along a passage to the tailor's shop but the door was locked. He turned and was penned up by three prisoners, Frederick Brown, Ivanhoe Williams and Paul Tyrell, who chopped him on both hands. He fell. He subsequently returned to the rotunda in order to escape. He saw the deceased at the entrance to the dining hall being chopped by Winston White, Eaton Baker and Winston Brown. "A lot of prisoners", in hostile mood, were then in the rotunda with machetes held in "chopping positions". He again fell and was chopped beside the column in the rotunda. He saw the main door open and managed to run outside where he fell again about four chains from the building. He could not move and remained there until he was taken to hospital.

Like Blake, Miller spent a long time in the witness box under cross-examination. He was cross-examined for six days by seven counsel and there was, here also, the inevitable going over the same ground repeatedly. Many inconsistencies appeared also in his evidence both internally, and as compared with the evidence he gave at the preliminary enquiries at Brown's Town (in his own case) and at St. Ann's Bay. The more important of these were concerned with what he saw when he crossed the rotunda on his way to the tailor's shop and what he saw on his way back. He was challenged in relation to what he saw on his way back in light of the fact that he was already severely injured, and, as he admitted, his face was covered with blood after he fell and was chopped by the column. There was conflict in his evidence whether he saw the prisoners rushing from the dormitories with machetes when he was crossing the rotunda to the tailor's shop or on his way back. He said both and could give no explanation for this. There was conflict whether he saw the deceased being chopped before or after the prisoners rushed from the dormitories. He admitted that at St. Ann's Bay he gave a sequence of events which showed that he saw the deceased being chopped before he (Miller) moved to the door of the tailor's shop. This was inconsistent

with his evidence-in-chief, that he saw the chopping on his way from the the tailor's shop. Asked to explain the inconsistency he said both were right, that he could not remember everything. At the trial he said he was chopped before the deceased was, but he admitted having said at the preliminary enquiry at St. Ann's Bay that he believed the deceased was chopped before he was. He admitted that at the preliminary enquiry at Brown's Town he did not mention the names of Winston Brown or Eaton Baker. He explained that he did not mention Brown's name as it was his (Miller's) and not Tate's case. Much was made of Miller's admission that at the preliminary enquiry at St. Ann's Bay he said that he did not know who chopped the deceased Tate. This was, apparently, said in cross-examination. Asked to explain this against his now naming three of the applicants he said that at St. Ann's Bay he did not understand the question when it was asked, and it was after he left the court there that he realised he had made a mistake. This was a serious discrepancy and the explanation was not convincing. The force of the inconsistency was however very much reduced, if not lost, by the disclosure that during his examination-in-chief at the preliminary enquiry he had in fact called the names of the same persons whose names he called at the trial as chopping the deceased. There were other discrepancies dealing with the identity of those who chopped him.

Miller admitted that his memory was impaired because of the incident and that his memory "goes and comes". It was suggested to him that in view of unexplained discrepancies in his evidence some of what he said could be fact and some fantasy. He agreed. He was also cross-examined as to his mental condition and it was suggested that he was suffering from reactive depression. The learned trial judge reminded the jury of these admissions and suggestions and sufficiently reminded them of the discrepant evidence. It was submitted that Miller admitted that he was confused and his memory was so defective that the trial judge should have pointed out to the jury how this affected his credit and that this impairment made it unsafe to act on his evidence. In dealing with matters which the jury should consider in assessing the

evidence of witnesses (at pages 1382 and 1383 of the record) the learned judge told them:

> "You will remember it was put to him (Miller) that his memory is impaired, I think the adjective was substantially impaired. I will refer to it in detail in due course .....We don't know whether it was as a result of his injuries he is a sick man or not. It is a matter for you, but nevertheless you cannot dismiss from your mind this question of whether or not his memory is good enough to recall the events of that night and those events he having told you of, you can rely on him. That is the part of the credit of the witness Miller."

Later in the summing-up the jury were reminded in detail on this aspect of the evidence. In our view, the judge was not required to do more in this respect.

The third witness whose evidence it was submitted was wholly discredited was Berris Anglin. He was a prefect, as was Blake, and slept in the Surrey dormitory. He gave evidence of seeing a group of prisoners on the playing field in October 1969, about three weeks before the riot. They were the applicants Winston White, Brown, Tyrel and Baker and Tony White, who was acquitted. He said that he heard Baker use words to the effect that he was going to hold up the warder and escape. On the night of November 26 he was in his dormitory when the Blissett incident occurred and he saw warders Tate and Miller enter his dormitory and settled it. After the warders returned to the rotunda he was by his bed and saw the applicant Winston White "come from Cornwall dormitory with a cutlass" and started chopping the deceased, who was then seated at the table in the rotunda. He ran from the dormitory to the deceased's assistance and tried to disarm Winston White. Then the four others whom he had seen in the group on the playing field came into the rotunda and started chopping the deceased with cutlasses. He said he was chopped by Baker on his left hand and at the back of his head. When he got weak and could help the deceased no more he escaped through the main door of the rotunda. He was taken to hospital and remained there for twenty-three days. There were relatively few discrepancies in Anglin's evidence.

What it was submitted operated to his discredit was his evidence that he was the first to go into the rotunda; that he struggled with Winston White about two minutes before the others ran out with machetes; and that those whom he named, the deceased and himself were the only persons in the rotunda for the fifteen minutes he spent there. Reliance was placed on the fact that this version of the incident was in conflict with those of all the other eye witnesses, none of whom saw him in the circumstances which he described. The main criticism of the summing up in relation to Anglin was that his evidence was not adequately compared with the evidence of Blake and Miller and the basic differences pointed out.

We have no hesitation in holding that there is no ground on which it can justifiably be said that Anglin was so discredited that no reasonable jury could safely rely on his evidence. A matter of some importance regarding his credit was the undeniable fact that he was seriously injured on the night of the riot. In the absence of any evidence of how otherwise he was injured, the jury could reasonably find that he was injured in trying to defend the deceased. This would lend credence to his evidence that he witnessed the attack on the deceased. We had more difficulty in coming to a decision about Blake and Miller. There can be no doubt that their evidence was seriously discredited in many respects. We are, however, of the view that it was essentially a matter for the jury what credit, if any, they would, in the circumstances, give to their evidence. We cannot, therefore, say that the learned judge was wrong in not treating the evidence of these two witnesses as if they were wholly discredited.

General complaint was made of the failure of the judge to compare and contrast the evidence of the eye-witnesses. This was not done, though in places conflicts between certain of the witnesses were pointed out. We think that, as a general rule, where the evidence of two witnesses are irreconcilable a direction to this effect should be given and, depending on the circumstances, the jury should be told that acceptance of one means rejection of the other and that reliance should not be placed on both. The evidence of the eye-witnesses in this case differed in many material respects. This was only to be expected because of the

nature of the attack, the number of persons involved, and as the witnesses spoke of seeing the attack upon the deceased from varying locations, namely, the three dormitories and the rotunda. In addition, the trial was some fifteen months after the incident. The accounts given by Blake and Miller of what occurred in the Cornwall dormitory immediately before the attack upon the deceased were, in our view, irreconcilable and the jury should have been told so. This affected the applicant Sylvan Johnson and more will be said about this later.

In relation to the events in the rotunda during the attack on the deceased, it was too much to expect the trial judge to compare and contrast the evidence of the seven eye-witnesses. It would have been clear to the jury, while each witness gave his evidence and on being reminded of it, that their accounts differed in material respects and that this was a factor to be taken into account in their overall decision. For instance, where a witness named certain prisoners as taking part in the attack upon the deceased and not others, the jury would be bound to realise that this fact should be taken into account in favour of those not named, due allowance being made for the fact that one might not have seen whom the other saw because of the melee and the different angles from which the scene was viewed. Apart from Anglin's account of what he saw while in the rotunda, the accounts given by the other witnesses are not palpably irreconcilable. Nor would Anglin's, but for the isolation for fifteen minutes of himself, the deceased and the attackers he named. It was for the jury to say which of the accounts they believed. In reminding them of the evidence of each witness the judge told them from time to time that it was for them to say whether or not they accepted the evidence of that witness and towards the end of his summing up he told them (at pp. 1558 & 1559 of the record):

> "I can't remember if I told you in plain terms, Madam Foreman and members of the jury, but you may think it is a point which does not desire much stressing. In considering the evidence against each accused and in assessing the evidence given by each witness if you feel that you cannot rely on the evidence of any particular witness - a particular witness that is called in

respect of an accused, so that you reject it, you look to see whether there is any other evidence concerning him coming from any other witness, and if you can rely on that then you can use that, but you would have rejected the evidence of the one you say you cannot rely on."

For the reasons we have given, there is no valid ground for our interfering with the convictions because of the general complaint relating to inconsistencies and contradictions.

Another ground of complaint which was common to all the applicants was that the learned trial judge failed to tell the jury that if they accepted that the witnesses Blake and Anglin were in the rotunda with machetes they should be regarded as accomplices. It was submitted that the allegation that Blake and Anglin were armed with machetes during the riot obliged the judge to direct the jury on the law as to accomplices and persons with an interest to serve. This allegation was made by the applicant Winston White in his statement from the dock and is as follows:-

" On the night after I am gone to bed ... I heard a prisoner by the name of Blissett....bawl out for help .....for warder Miller and warder Tate were beating him.....Soon after him bawl, for minutes after him bawl for help I see prisoner rush from out of the three dormitories to the rotunda where I see warder Tate, warder Miller and Anglin and "Lifey", Adolph Blake..... a see Adolph Blake and Anglin with a cutlass, each of them have a cutlass.

"HIS LORDSHIP: Each of them had a cutlass?

"A.: Yes, my lord, Anglin and Blake.....have a cutlass under the arch where all the prisoners were running.....I was frightened....and what I have seen a jump through a window, a broke a glass window in my dormitory....and jump through....."

It was suggested to Blake and Anglin during cross-examination that they were armed with machetes during the riot. Both denied it. Apart from what the applicant White said, there was no evidence or statement in the case that they were so armed.

The duty on a trial judge to warn the jury in regard to the evidence of an accomplice only arises where there is evidence on which it can reasonably be found that the witness in question was an accomplice. Unlike the sworn evidence of a prisoner, a statement from the dock is not "evidence" for all purposes in the case. It serves a purpose limited to the case of the prisoner who makes it. That prisoner is entitled to have it considered by the jury in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty (see R. v. Frost and Hale (1964) 48 Cr. App. R. 284. The defence of the applicant White was that he did not take part in the riot that he was never in the rotunda during the attack, that he broke out from his dormitory and ran to the police station. What he said about Blake and Anglin being armed was, therefore, not necessary for the defence he was setting up. It did not affect the question whether he was one of those who were present in the rotunda attacking the deceased. Having a limited purpose and no probative value in itself, the statement was not material on which, in the circumstances, a finding could be made, either generally or with respect to the case of White, that Blake and Anglin were accomplices. For this reason we hold that this ground of complaint is without merit. If we thought that there was any substance in the complaint we would have applied the proviso to s. 13(1) of the Judicature (Appellate Jurisdiction) Law, 1962. Blake and Anglin were two of five witnesses who said that they saw White chopping the deceased. Added to this, by convicting him the jury obviously rejected his statement and there is no reason to think that they rejected his statement to the extent that it sought to exonerate himself but accepted it insofar as it sought to implicate Blake and Anglin. This aspect of the statement could hardly have been believed when it was clear on the evidence that the attack was against the warders and prefects and Blake and Anglin, both prefects, were injured.

We turn now to the individual applications and it is convenient to deal first with the application of Paul Tyrell. His first ground of complaint was that "the learned trial judge's failure to rule on the admissibility of the evidence of Hubert Robinson that the appellant

chopped him and the remarks of the learned trial judge that he would deal with this evidence in his summation to the jury operated unfairly as to the presentation of the defence. The reasonable inference at the time when the learned trial judge spoke was that he intended to tell the jury to disregard the evidence but instead his charge to the jury was that he wanted it to be clearly understood that the evidence was admissible and he had intended to admit it". During the examination-in-chief of the witness Robinson it was sought to elicit evidence that during the riot Robinson was chopped by Tyrell. Objection was taken by Mr. Chin See for Tyrell to the witness giving the names of the persons who the witness saw with machetes. The judge pointed out that he had already ruled that that evidence was admissible. Mr. Chin See persisted in making his objection and stating his grounds. After this the witness was asked by Mr. White, who was conducting the examination, to give the names of the men. The witness gave five names, including Tyrell's. He was then asked who was it that chopped him. Though the answer does not appear on the record it is agreed that he gave Paul Tyrell's name in reply. The judge had, apparently, ruled earlier that when the time came for this last question to be asked Mr. White would have been required to answer Mr. Chin See's objection for the Court's ruling before the reply was given. Mr. White said he had forgotten. The judge then said: "The evidence is there. I will deal with it". It is not now contended that the evidence giving Tyrell's name was inadmissible. What is said is that Mr. Chin See was misled into thinking that because of the manner in which the evidence came to be given the learned judge meant, by what he said, to direct the jury to disregard the evidence. As a result, it is said, he limited his cross-examination on the point. It is a little difficult to understand why, if this is what Mr. Chin See thought, he referred to the matter in cross-examination by suggesting to the witness that Tyrell did not chop him that night. We think that the use by the judge of the words "The evidence is there" is inconsistent with an intention to direct the jury to disregard it. Had he so intended one would have expected him to tell the jury so there and then and then repeat it in his summing-up. It seems Mr. Chin See can only

blame himself for assuming that the judge meant what he had not said.

In dealing with Robinson's evidence under cross-examination by Mr. Chin See in his summing-up the learned judge referred to the evidence that Robinson gave that Tyrell was standing by the door leading from the rotunda outside and that that was where he was chopped by Tyrell. The judge then referred to a question asked, he thought, by Mr. White for the prosecution in his closing address by way of comment on this aspect of Robinson's evidence as it affected Tyrell. The question was: "Is it to be gathered then from the evidence of this witness that Tyrell was, what you called, the guardian of the gate with the cutlass to see if anybody is escaping, because this witness said he saw him with the machete at the gate?" It was submitted that this comment by the trial judge could very well have brought about an adverse verdict and that the failure of Mr. Chin See to cross-examine Robinson fully must have operated to the prejudice of Tyrell. It is said that together these may have tipped the scales in the acceptance of the witness Anglin that Tyrell chopped the deceased.

As the record appears to show (see p. 1496), the comment was not the Judge's comment but one which had been made by prosecuting counsel. We can see nothing wrong in this. The prosecuting counsel was entitled to make the comment and it was one which he could fairly make on the evidence. There was nothing improper in the judge reminding the jury of the comment if he thought fit to do so, as he apparently did. The evidence that it was Tyrell who chopped Robinson was clearly admissible, as the learned judge told the jury. We are unable to detect any prejudice resulting to Tyrell by the cross-examination of Robinson being limited as is claimed. In any event, it was not the judge's fault that the witness was not fully cross-examined.

The next ground argued for Tyrell was that "the learned trial judge's direction to the jury in respect of the possibility of the burning of prisoners' clothing was totally unwarranted and was not in the slightest supported by any evidence. This comment had the effect of eroding a point in favour of the appellant that no blood was found on his clothing and could only amount to a miscarriage of justice."

It was pointed out that there was evidence in the case from Miller and Anglin that Tyrell chopped Miller and the deceased Tate and that Miller's evidence suggested that Tyrell was in close proximity to Miller while chopping him. It was said that the argument to the jury in such circumstances would be: "how is it no blood is found on Tyrell's clothing". It was said, further, that such an argument was a reasonable one and could very well have created doubt in the jury's mind as to whether or not Tyrell was involved as stated.

When reviewing the case of the accused Glenis Stoner, the learned judge reminded the jury of the expert evidence that blood was found on a ganzi and pair of trousers said to have been taken from Stoner. He then pointed out that the evidence was that during the chopping in the rotunda, the prisoners involved were dressed in pyjamas issued by the prison authorities and that there was no evidence that the prisoners when re-captured were wearing pyjamas or that the pyjamas being worn by the persons on trial were ever found. The learned judge then continued at p. 1414 of the record:

> "Where are the pyjamas, because if you could identify the pair of pyjamas that each man had or if he was there with the machete to be chopping Tate then you would expect blood. Then, of course, the prosecution's case is, looking at the other side, but you wouldn't find it, the dormitory set afire, plenty things burnt up and you don't know whether this went up in the conflagration; but that is an area in which you and I are no more wiser as to what could have happened."

It was submitted that the effect of this passage was to erode away a point clearly in favour of Tyrell and that this aspect of the summing-up is based on a matter of conjecture. Mr. White, for the Crown, argued that this was a favourable direction for the defence in that the learned judge was telling the jury: (1) that it is the clothes being worn at the time of the chopping (the pyjamas) that was relevant and (2) that they were in no position to decide on the prosecution's contention. We are inclined to agree with Mr. White. But the real answer to this complaint is that there was no evidential basis upon which the suggested argument

in favour of Tyrell could rest. There was no evidence to identify the clothes Tyrell was wearing when he was taken into custody and his clothes were not sent to the analyst. There was no evidence that his clothes were examined and no blood was found on them. We think, therefore, that the submission that this passage in the summing-up had the effect of eroding a point in favour of Tyrell is somewhat far-fetched. We find no merit in this ground.

The evidence upon which the prosecution relied to implicate the applicant Tyrell in the murder came from the witnesses Anglin, Miller and Hubert Robinson. As already stated, Anglin said he saw Tyrell chopping the deceased and Miller saw him in the rotunda at the relevant time armed with a machete. Hubert Robinson was asleep in his bed in the Cornwall dormitory and was awakened by the noise of the riot. He said that he saw a crowd of about fifty in the rotunda and behind this crowd he saw Tyrell, Winston White, Winston Brown, Junior Thompson and Eaton Baker each with a machete. It was submitted on behalf of Tyrell that the verdict of the jury whereby he was convicted was unreasonable and/or unsafe having regard to the evidence. This submission depended largely on the contention that Anglin's evidence was wholly discredited or was so unreliable that no reasonable jury could convict upon it. If this submission is accepted that would dispose of the case against Tyrell because Anglin's was the only evidence that Tyrell chopped the deceased and by their verdicts it was clear that the jury did not convict anyone who was not actually seen chopping the deceased. We have already held that there is no ground on which we can justifiably say that no reasonable jury could safely rely on Anglin's evidence. It was for the jury to say whether, in spite of the valid criticisms of his evidence and the fact that he was the only one who saw Tyrell chopping the deceased, they were prepared to rely on it. In convicting Tyrell they obviously believed Anglin. This would be sufficient to dispose of this submission but for one further aspect of Anglin's evidence to which our attention was invited.

During the cross-examination of Anglin by Mr. Chin See the

following passage occurs:

"Q. .....So let me see if I understand you. Whilst Miller and Tate were in fact leaving the Surrey dormitory and walking out these men ran out immediately?

A. Yes, sir.

Q. But, of course, you agree with me that you didn't see Tyrell run out of the Surrey dormitory, you never saw him at the entrance at the Surrey dormitory?

A. Not until he was at the gate.

Q. You didn't see him leave that entrance of the Surrey dormitory?

A. No, sir."

It is said that the inference from the answer "Not until he was at the gate" is that Anglin did not see Tyrell chopping the deceased - that he did not see him in the rotunda at all; that the answer "was powerful in favour of Tyrell" and the trial judge made no mention of it in his summing-up. It is obvious that at the time the answer was given it was not understood to be capable of the meaning it is now sought to attach to it. If it was, one would have expected the line of questioning that followed it to show recognition of its value to the case of Tyrell and Mr. Chin See could not have failed to highlight it in his closing address to the jury. Mr. Chin See, however, said, quite frankly, that he did not think he dealt with it in his address. It was submitted that the failure of the trial judge to point out this aspect of Anglin's evidence and the significance of it to the jury makes it unsafe for this court to uphold Tyrell's conviction. If the significance of the evidence escaped Mr. Chin See, who appeared for Tyrell, (and all the other counsel in the case who, otherwise, would surely have brought it to his attention) the learned judge can hardly be blamed if it also escaped him. Throughout his evidence Anglin did not shift from his assertion that Tyrell was among those chopping the deceased. We are not satisfied that by the answer in question he was saying the contrary. The submission that the verdict is unreasonable therefore fails.

Finally, on behalf of the applicant Tyrell, it was contended that the verdicts of the jury were highly inconsistent. It was argued that Anglin named Tony White as one of the persons he saw chopping the deceased; that there was nothing on the evidence to have caused the jury

acting in a reasonable manner, to have acquitted Tony White and not acquit Tyrel since Anglin was the only witness who implicated these two in the actual chopping; that there was nothing to distinguish the cases ~~between~~ against Tony White and Tyrell; and that if the jury accepted Anglin as a witness of truth they would necessarily have convicted Tony White. It was argued, further, that the acquittal of White meant that the jury felt that Anglin was, at least, mistaken and that it was, therefore, unsafe to uphold a conviction in relation to any accused based on Anglin's evidence.

As was done by the Court of Appeal in R. v. Hunt (1968) 2 All E.R. 1056, in dealing with the arguments addressed to us on the inconsistency of the verdicts we follow the approach taken in R. v. Stone (unreported) in which Devlin, J. said, (1968) 2 All E.R. at 1058):

> "When an appellant seeks to persuade this court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly upon him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby, that no reasonable jury who had applied their minds properly to the facts in the case, could have arrived at the conclusion; and once one assumes that they are an unreasonable jury or they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is upon the defence to establish that."

The principles applicable in regard to inconsistent verdicts are the same whether there are verdicts on different counts of an indictment against the same person which are said to be inconsistent or whether it is verdicts on the same count in respect of different persons. Most of the authorities are concerned with the former, but R. v. Wycliffe Anderson et al (an unreported judgment of this court in 1963) was concerned with the latter. In the latter type of case the real question that arises for decision is whether on the evidence the jury could reasonably draw a distinction between the cases of the two or more persons who were respectively convicted and acquitted. It is not

sufficient that the verdicts appear to be inconsistent. The facts of each case must be carefully examined and it must manifestly appear that the jury could not reasonably have returned the verdicts they did before what is otherwise a perfectly proper verdict can be set aside on this ground. In R. v. Drury (1972) 56 Cr. App. R. 104, the court rejected as too bold, "the proposition that the simple fact that a jury has returned inconsistent verdicts.....means that in every such case this court is obliged ex necessitate to quash the conviction." It was stated that the court's decision depended upon the facts of each case.

We have given anxious consideration to the arguments regarding the inconsistency of the verdicts in the cases of the applicant Tyrell and of Tony White. Applying the approach and principles stated above, we are unable to say that the jury could not reasonably have returned the verdicts they did. In seeking to make a distinction between the cases of Tyrell and Tony White, it was submitted on behalf of the crown that White's acquittal may very well have been due in part to the fact that in correcting himself, the witness Jonathan Smith had said, ".....When I mentioned him (meaning Tony White) I meant Winston White." This witness had given evidence-in-chief that Tony White was one of those whom he saw chopping the deceased. But in cross-examination he said that it was not Tony White after all, but Winston White. In our view, this would not be either a reasonable or a proper ground on which to reject Anglin's evidence as it affected Tony White. After careful consideration of the evidence, we are of the view that a valid distinction can be made between the two cases. No one was convicted in the case on the evidence of one witness only. In each case of a conviction, there was either two or more witnesses who saw the particular accused chopping the deceased or one saw the accused chopping the deceased and another or others saw him armed with a machete. In the case of Tony White, Anglin's was the sole evidence implicating him. In Tyrell's case, there was in addition to Anglin's evidence, the evidence of the witnesses Miller and Robinson, both of whom said they saw Tyrell in or near the rotunda armed with a machete after the attack on the deceased had started. The jury could legitimately, if they believed Miller and/or Robinson, have regarded this evidence as confirming the

evidence of Anglin in a material particular in the case of Tyrell while not being prepared to act on his evidence alone in the case of Tony White. In view of this clear distinction, we hold that it has not been established ~~established~~ that the verdicts are inconsistent as contended.

We are not satisfied that there is any valid ground for interfering with the conviction of the applicant Paul Tyrell. His application is, therefore, refused.

We deal next with the application of Sylvan Johnson. The ground of substance separately argued on his behalf by Mr. Leo Rhynie was that, "The verdict of the jury was inconsistent, unreasonable and/or unsafe." This ground was substantially argued when Mr. Leo-Rhynie argued the ground relating to the inconsistencies and discrepancies in the evidence of Blake and Miller. Adolph Blake was the only witness who said that the applicant Johnson was one of those who chopped the deceased. In addition to his evidence, the prosecution relied on the evidence of Miller and Delroy Brooks both of whom said that Johnson was armed with a machete on the night of the riot. The evidence of Blake and Miller have already been stated in outline. Delroy Brooks slept in the Cornwall dormitory. He said that he was sitting on his bed on the night of the riot and at about 8.30 o'clock he saw the deceased Tate sitting in the rotunda and Blake was standing there with him. Blake left the rotunda and went into the Cornwall dormitory. He then saw Blake run out of the dormitory to the deceased in the rotunda and told him, "Prisoner them a come with machete." After this he did not see Blake again. He saw Winston White rush towards the deceased with a machete. The deceased got up and Winston White chopped him. He saw other prisoners come out with machetes and backed up the deceased against the door of the storeroom. Of these, Eaton Baker, the tallest one, was the only one he recognised. Baker chopped the deceased. He, the witness, got up off his bed and eventually ran out through the main door of the rotunda which was open. On his way out he "....buck up" Baker running in with two machetes. The credibility of Brooks' evidence was not really challenged during the argument. His evidence was used rather to demonstrate the unreliability of the evidence of other eye witnesses,

mainly Blake, Miller and Anglin.

The applicant Johnson also slept in the Cornwall dormitory. In his statement from the dock in his defence he said that after he went into his dormitory after devotions, he fetched his rag and soap and went to the bathroom in the dormitory. He had to wait at the door of the bathroom a little as "the place was not convenient at that time." As he stood there, he heard a commotion coming from the other two dormitories and he saw prisoners run from his, Brooks', dormitory towards the archway. He said that Warder Miller came and ran the prisoners back, telling them to go back to their beds. He, Johnson, went into the bathroom, washed his feet and went to his bed. As he lay in bed he heard a commotion coming from the archway. It became louder and he got up from his bed and saw prisoners running from the archway into the dormitory, smashing windows and escaping through them. It was difficult for him to get through a window so he ran to the arch (rotunda) and ran out through the main door. He was outside for some time until he heard gunshots. He ran away into the bush and was eventually taken into custody by the police that night.

There were several grounds upon which it was contended that the verdict was unreasonable and/or unsafe. There was, first of all, the evidence on which the prosecution relied to prove that Johnson was involved in the initial violent incident of the night. This was the evidence given by Blake and Miller, that each was attacked by Johnson in the Cornwall dormitory and that this was the initiating incident of the night. The evidence of these two witnesses regarding this incident were in violent conflict and, as we have said, were in our view irreconcilable. Blake claimed that Johnson came from the bathroom in the Cornwall dormitory with a machete held in a chopping manner, that Johnson pursued him into the rotunda and chopped him, and that this, in effect was how the riot started. Miller, on the other hand, said that he was in the Cornwall dormitory, saw Blake in there; that Blake spoke to him and after this Johnson chopped at him, Miller; that he ran into the rotunda and that this was, in effect, the start of the riot. Neither saw Johnson chop at the other though Miller said that Blake was near to him at the time. Implicit in what they said is the fact

that each was denying that what the other said occurred at all. As we have said, the jury should have been told that their evidence was irreconcilable and that though it was open to them to rely on one or the other regarding this incident, they could not properly rely on both. They were not told this by the learned judge. This aspect of the evidence as it affected Johnson was rendered less acceptable because the witness Brooks, from his bed in the dormitory, did not see either of these incidents as related by Blake and Miller. Brooks did not see Johnson attack Blake in the dormitory though he said he saw him with a machete and saw him run out with Blake. The learned judge misrepresented Brooks' evidence to the jury when he told them that Brooks "saw Johnson chase Blake with a machete". This is not what the witness said. In cross-examination he was asked and answered as follows:

"Q. You also said Silvan Johnson ran out with him (Blake)?

A. Yes, sir."

As regards Miller's account, Brooks said that he saw Johnson when Miller was in the dormitory (Cornwall). Johnson was then by his bed; he saw Miller when he (Miller) went back into the arch. He said that up to when Miller went back into the arch everything was quite normal in the dormitory. After Miller left to the arch Sylvan Johnson left his bed and went into the toilet.

According to Blake's evidence the applicant Johnson was the principal aggressor. Not only did he initiate the night's violent incidents by attacking Blake and chopping him, but he was the first person, Blake said, to chop the deceased. If Blake was speaking the truth, one would have expected Johnson's to have been among the first names he would call when relating the night's events afterwards. It was pointed out that though Johnson was in custody from the night of the riot, it was not until five months after the incident (on April 14, 1970), that he was charged with the murder of Tate, though Blake gave a statement to the police on the day following Tate's murder. Further matters which, it was submitted, affected Blake's credibility insofar as Johnson was concerned, were the fact that Blake was the only witness who saw Johnson in the rotunda during the attack on the deceased and that his evidence that

Johnson was the first to chop the deceased is in direct conflict with that of the other six eye-witnesses. However, we think the most telling point affecting Johnson's conviction has to do with the acquittal of Glenis Stoner.

Both Adolph Blake and Jonathan Smith gave evidence that Stoner chopped the deceased. There was no other evidence implicating Stoner. He was nevertheless acquitted. It is obvious from the verdicts returned that the jury did not accept Smith as a witness of truth. Of the three persons he said he saw chopping the deceased, only one, Winston White, was convicted, and in his case there were five others who implicated him in the actual attack on the deceased. Smith was, no doubt, rejected because, as already stated, he quite deliberately stated during his examination-in-chief that Tony White was one of those chopping the deceased. Then during his cross-examination when he was confronted with his evidence at the preliminary enquiry, he said that it was Winston White he meant though he knew the difference between the two. With Smith rejected, Stoner was acquitted as, obviously, the jury were not prepared to convict him on Blake's evidence alone. Reference has already been made when dealing with Tyrell's application to the fact that the jury did not convict anyone on the unsupported evidence of one witness. It seems clear, therefore, that Johnson was convicted because the jury accepted Miller's and/or Brooks' evidence as supporting Blake's.

The prosecution relied partly on a pre-arranged plan among the prisoners to attack the warders on duty and to escape from prison. This was based on the evidence given by Anglin about the conversation he overheard on the playing field in October, 1969. The applicant Sylvan Johnson was not then a prisoner at the Hilltop prison. The verdicts returned do not indicate that the jury placed any reliance on the alleged pre-arranged plan. The prosecution relied mainly on evidence of a concerted attack on the deceased with those who were armed but not seen chopping him being regarded as aiders and abettors. As already indicated, those who could only be regarded as aiders and abettors were acquitted. The evidence of Miller and Brooks could therefore only properly support Blake's in implicating Johnson if on their evidence it

was open to the jury to regard Johnson as an aider and abettor in the murder.

Miller's evidence was that Johnson chopped at him in the Cornwall dormitory. This was prior to the attack on the deceased. He (Miller) ran from the dormitory but he did not say that Johnson pursued him. In cross-examination he stated quite categorically that after he saw Sylvan Johnson in Cornwall dormitory he never saw him again that night. The learned trial judge did not remind the jury of this statement by Miller when dealing with the case of Sylvan Johnson or at all. But he seemed to have formed the view at the end of Miller's evidence in chief, perhaps because of this statement, that Miller's evidence did not implicate Johnson in the murder. At that time, in enquiring whether Mr. Leo-Rhynie wished to cross-examine Miller, the judge said: "oh, yes, he has not touched you touching the offence before the court, but he has touched you in the corner". Brooks' evidence was that he saw Sylvan Johnson run out with Blake and never saw him after that. This also was prior to the attack on the deceased. Blake's account of the direction he took when he ran into the rotunda pursued by Johnson, was not supported by Brooks. Brooks said that both Blake and Johnson went to the right on leaving the dormitory, which would take them to the main entrance to, or exit from, the rotunda. This is how Johnson said he left the building. Brooks himself went in the same direction afterwards, found the gate open and so escaped.

We hold that on the evidence of Miller and Brooks it could not reasonably be found that the applicant Johnson was present aiding, abetting and assiting in the murder of Tate. Their evidence cannot, therefore, properly be regarded as supporting Blake that Johnson was a participant. If all this had been explained to the jury by the learned judge, and it was not, we doubt that they would have convicted Johnson. For Blake's evidence would then stand alone and in the case of Stoner where this was the position they acquitted. Mr. White, for the Crown, frankly conceded in the argument before us that, taken by itself, on general credibility Blake's evidence is not in a strong position.

In R. v. Barnes (1943) 28 Cr. App. R. 141, Humphreys, J. in the Court of Criminal Appeal referred to the provisions of Section 4 (2)

of the Criminal Appeal Act, 1907 and, in particular reference to the provision that the Court shall allow the appeal if they think that the verdict of the jury "cannot be supported having regard to the evidence", said, at p. 142:

> "Those last words have been interpreted in more than one case in this Court as amounting to this: if the Court thinks that the verdict is, on the whole, having regard to everything that took place in the Court of trial, unsatisfactory."

The provisions of Section 13(1) of our Judicature (Court of Appeal) Law, 1962 are identical in terms to those of Section 4 (1) of the Act of 1907. Based on the arguments in support of the application of Sylvan Johnson which we have noticed and examined we hold that his application is entitled to succeed on the ground that the verdict cannot be supported having regard to the evidence, as those words were interpreted in Barnes (supra).

The majority of the Court think Johnson's application is also entitled to succeed on the simple ground that the verdict convicting him is inconsistent with that acquitting Stoner. Unlike the case of Tyrell, there is, in the view of the majority, no valid distinction that can be drawn between the evidence implicating Stoner and that implicating Johnson in the murder. It was submitted that Stoner may have been acquitted because he gave evidence on oath in his defence (he was the only one to do so) and that his evidence enured not only in his favour but also in favour of Junior Thompson as he said that Thompson and himself were tried and acquitted for wounding Miller. The majority hesitate to accept as a valid distinction the fact that Stoner gave sworn evidence and Johnson did not, bearing in mind where the burden of proof lay. It seems to them that it is the nature of the evidence against each of the accused that must be examined. The fact that Stoner's sworn evidence may have been accepted in preference to Blake's can only operate to Blake's discredit and it is precisely because, by the jury's verdict, he was discredited in respect of Stoner where his evidence stood alone why it is said that a similar view should be taken in respect of Johnson where his evidence also stands alone. The majority are also of the view that

the fact that Stoner was acquitted by another jury for wounding Miller is not a proper ground for acquitting him in this case and is, therefore, not a valid ground of distinction.

The eyewitnesses who implicated the applicant Winston Brown were Blake, Miller, Anglin and Robinson. The first three said that they saw him chop the deceased. Robinson said he saw him at the back of the crowd in the rotunda with a machete in his hand. In addition to the evidence of the eyewitnesses, the prosecution put in evidence, as part of the case against Brown, a plaid shirt which was found to have human bloodstains on it. Detective Inspector James Robinson gave evidence that Brown was wearing this shirt with stains on the day following the riot when he charged him at the Bamboo police station for murder. Brown denied in his statement in his defence that he either owned a plaid shirt or was wearing one on the occasion alleged. He said it was a ganzie shirt that was taken from him by Inspector Robinson.

In support of Brown's application, it was contended that "the learned trial judge misdirected and/or insufficiently directed the jury as to the proper assessment of the evidence respecting the blood found on the shirt allegedly belonging" to Brown. In a brief outline of the evidence on which the prosecution relied as implicating each of the persons charged the learned judge told the jury (at p. 1,388 of the record):

> "With regard to the accused Winston Brown, three eye-witnesses told you that they saw him use a machete on the deceased Tate, chopped him, Tate, with a machete. In addition, one witness said that he saw him with a machete. Further, in addition, I will have to examine with you certain clothes, according to the police, taken from Winston Brown when examined by the analyst indicated that blood marks were found on them, but remember, on this point Brown challenges that piece of evidence whether that particular material or clothing was taken from him."

Later, after reminding the jury in detail of Inspector Robinson's evidence concerning this shirt and of the fact that human bloodstains were found on it, the learned judge is reported as saying (at page 1517 of the

record):

"....If you accept that the plaid shirt taken from him had on this bloodstain or bloodmark, inasmuch as it was not sufficient for grouping, how did it get on it? Those are matters for you."

Complaint was made that the judge did not put in its proper perspective the evidence touching upon the question whether it could be safely concluded that Brown was wearing the plaid shirt on the day after the riot as alleged. But the more substantial complaint was that a finding that the applicant Brown was wearing the shirt on the day after the riot would not inevitably or necessarily lead to the conclusion that Brown was criminally involved in the killing of the deceased. It was submitted that the judge was obliged to give careful directions to the jury as to the effect and application of such a finding. We need deal only with one aspect of Mr. Taylor's arguments on this latter complaint.

Before any unfavourable inference could be drawn from the fact that human bloodstains were on Brown's shirt on the day after the murder, the prosecution would be obliged to prove, directly or inferentially, that the shirt was being worn by Brown at or about the time of the riot. There was no direct evidence to this effect and any inference that it was being so worn to which the fact that he was wearing the shirt on the day after could give rise was rendered incapable by positive evidence from witnesses for the prosecution to the contrary. The witness Blake, under cross-examination by Mr. Taylor for the applicant Brown, said that at the time of the riot all the prisoners in Cornwall were dressed either in pyjamas or "prison togs" called "bollocks". The prison togs, he said, consisted of shirt and trousers both made of the same white drill material. The applicant Brown was from the Cornwall dormitory and the shirt allegedly taken from him by the police was of red and blue material. In the evidence of the witness Hubert Robinson under cross-examination the following passage occurs (at page 1190 of the record):

"Q. ....The persons that you saw in the rotunda were they dressed in pyjamas?

A. Yes, sir.

HIS LORDSHIP: All of them?

A. Yes, sir, everyone of them dressed in pyjamas, sir."

Three pages later:

> "Q. I gather that what you are saying is that you did not see any of the inmates on the rotunda in prison clothes, they were all in pyjamas?
>
> A. Yes, sir, all in pyjamas, all what I saw."

Winston Brown is one of those whom Robinson said he saw in the rotunda.

It was submitted that from the passages quoted above from the summing-up, the trial judge was clearly leaving it open to the jury to draw an inference adverse to the applicant Brown from the evidence relating to the shirt. We agree and so does Mr. White for the Crown. It is a clear misdirection and a serious one because evidence was expressly left for the jury's consideration against Brown which, as it turns out, did not in fact implicate him. Strangely enough, as already indicated, when dealing with Stoner's case the learned judge told the jury that the evidence was that during the chopping in the rotunda the prisoners involved were dressed in pyjamas. Mr. White submitted that this misdirection must be taken against the background of the other evidence in the case implicating Brown. He argued that even if the jury took the evidence into account it was not such a weighty matter as would have caused the jury to use it either by itself or with other evidence; that even if it was taken into account it could not have swung the case against Brown as the eye-witness evidence was overwhelming. Mr. White invited the court to apply the proviso to section 13(1) of the Law of 1962, if this is considered to be a serious misdirection. We cannot say whether the jury took this evidence into account against Brown or not and, if they did, to what extent it influenced them. But we have to deal with the matter on the basis that they did take it into account. There is much force in Mr. White's argument that taken by itself this evidence is relatively insignificant when compared with the other positive evidence implicating Brown. If this was the only fault to be found in the summing-up respecting Brown, we would certainly be inclined to yield to Mr. White's invitation to apply the proviso. But it was not.

Complaint was made that the learned trial judge failed to put the applicant Brown's defence to the jury in its proper perspective. Several matters were detailed and urged in support of this complaint but, in our

view, only one had merit. This was that the judge neglected to advert to the evidence of the witness Delroy Brooks touching Brown's whereabouts and movements at the time when the incident began.

Brown's defence as disclosed in his unsworn statement at the trial and as put to the several witnesses in cross-examination was that at the time of the riot he had an injured instep which was bandaged. He was only able to hop around. The injury was received on the day before the riot. The fact that he had the injury prior to the riot was confirmed by several witnesses for the prosecution. Brown said that he was in bed when the commotion started in the rotunda. He saw prisoners running around with machetes and rushing out of the three dormitories. Some of them smashed windows and climbed through. He could not go through a window because of his "bad foot", so he waited until most of them had come out of the dormitory. Then he "hitched along the wall", hopped behind the crowd when most of them had come out of the dormitory and entered through the main entrance out into the compound from whence he left and went to the Bamboo Police Station.

Mr. Taylor sought support for Brown's story when he cross-examined Delroy Brooks, as both Brown and Brooks slept in the same dormitory - Cornwall. The prisoners slept in bunks. Brooks said that he and Brown slept in the same pair of bunks - he in the upper and Brown in the lower. He confirmed that on the day of the riot Brown could not put his full weight on his injured instep, which was bandaged. Then the following evidence was given by Brooks in cross-examination (page 959 of the record):

> "Q. And in fact, Mr. Brooks, when you left the dormitory to go through the rotunda where this incident had taken place, you left Winston Brown still on his bed or in the process of getting off his bed?
>
> A. Well, I don't remember. When I get up off my bed, sir, I leave some prisoner underneath the bed, you know sir."
>
> Q. Left him underneath the bed?
>
> A. I don't know if him did leave. I know when I come out me leave some of them under the bed 'pon the floor'. I don't know if him did underneath fe him bed, sir.
>
> Q. You didn't see Winston Brown going through the dormitory before you went out?
>
> A. No, sir.

Q. And up to the time that the incident started Winston Brown was actually on his bed and you were on top?

A. Yes.

HIS LORDSHIP: When the incident started what happened about Winston Brown?

A. Him did underneath fe him bed, sir."

Mr. Taylor submitted that if Brooks' evidence as disclosed in the above passage was accepted, Brown's innocence would have been conclusively established; that Brooks did not see Brown leave at any time, and could not have failed to see him had he done so. He said that this vital bit of Brooks' evidence was never mentioned to the jury. If Brooks' evidence was believed, this was, indeed, strong evidence in support of the case Brown put forward. If it is true, as Brooks said, that Brown was on his bed when the incident started this would certainly give the lie to the evidence of Blake and Anglin who had Brown, among others, attacking the deceased almost as soon as the incident started. Brooks said he saw the start of the incident and did not see Brown going out of the dormitory.

Mr. White admitted that this was a serious omission on the part of the learned judge but he submitted that on the rest of the evidence this omission and the misdirection in respect of the shirt cannot be said to have occasioned a miscarriage of justice. Again he invited the court, in the circumstances, to consider applying the proviso to section 13(1). In our view, it was absolutely necessary, for a proper consideration of Brown's defence, that the jury should, at least, be reminded of this positive and vital evidence in his favour. This is all the more so because the evidence was given on February 9 and Brown's case was dealt with in detail in the summing-up on March 2. The chances of the jury remembering that the evidence had been given and taking it into account in Brown's favour are, therefore, remote. This leads us to consider whether or not the proviso can properly be applied.

As we have said, the main witnesses implicating Brown were Blake, Miller and Anglin, and serious doubts were raised on the evidence

regarding the credit of Blake and Miller. Blake's evidence regarding the applicant Brown had very little weight. He named Brown as a participant for the very first time at the trial. He had the opportunity of naming him in his statement to the police and at the two preliminary enquiries, but did not. His explanation in re-examination that he did not know or remember Brown's name at the preliminary enquiry into the charge of murder was far from convincing, especially as he had said in cross-examination that he had seen no one else chopping Tate but those he named at the preliminary enquiry, and that what he said at the preliminary enquiry was the truth. Moreover his credit standing alone is in doubt in view of the acquittal of Glenis Stoner. Anglin's evidence, though, on the face of it, more credible than Blake's or Miller's was not free from inconsistencies and was rendered less credible on comparison with the evidence of Brooks and Raymond Green, against which no real objection was raised on appeal. In addition, as in the case of Blake, the jury indicated that they were not prepared to rely on his evidence alone by the acquittal of Tony White. Though, as we have said, the credit to be given to the evidence of these witnesses was essentially a matter for the jury, we are quite unable to say that the quality of their evidence was such that the jury would inevitably have convicted the applicant Brown if they had been properly directed regarding the blood on the plaid shirt and the evidence of Brooks which was favourable to him. The proviso cannot, therefore, be properly applied and Brown's application is entitled to succeed.

The case against the applicant Eaton Baker was overwhelming. Five witnesses named him as chopping the deceased, namely Blake, Miller, Anglin, Brooks and Green. The witness Robinson saw him in the rotunda with a machete. Raymond Green was a prefect and slept in the Surrey dormitory. His evidence was that from his dormitory he saw Winston White go from Cornwall dormitory with a machete and started chopping the deceased. Eaton Baker ran from Middlesex dormitory with a machete and started chopping the deceased saying that "Tate must dead now". Alphonso Phipps also came and started chopping the deceased. He said

that there were "lots of prisoners" under the archway at the time. They kept on chopping the deceased who went and lie down by the table in the dining hall. He did not see any of the other prisoners (on trial) under the arch that night, but he is certain of the three he saw. He said he ran to the Surrey bathroom and hid himself. He remained there for a long time and "after the place got scanty" he ran out and went to the Bamboo police station.

Complaint was made of the manner in which the trial judge dealt in his summing-up with the evidence given by Anglin about the group he saw on the playing field in October, and what was said by the applicant Baker on that occasion. It was said that the judge failed properly to put to the jury the inconsistencies in Anglin's evidence as to what Baker allegedly said, and that to the prejudice of Baker he mis-stated the evidence. We do not think that this aspect of Anglin's evidence influenced significantly the jury's consideration of the case against Baker or any of the others Anglin named. As we have pointed out, the jury clearly placed the greatest reliance on the evidence of actual participation in the attack upon the deceased Tate. We are not satisfied that Baker was seriously prejudiced, if at all, by any fault on this aspect of the summing-up.

In dealing with the prosecution's contention, arising from Anglin's evidence of what he saw and heard on the playing field, that there was a pre-arranged plan among the prisoners to escape, the trial judge referred to the five named by Anglin as a committee headed by Baker as chairman. Exception was taken to this reference to Baker that it was prejudicial and that there was no evidence that Baker was the chairman of any "killing committee". The learned judge spoke of "a committee of five planning the escape". The words "killing committee" were never used by him. There is no merit in this complaint, especially in view of what we have just said about this aspect of Anglin's evidence.

It was submitted that the trial judge wrongly disallowed counsel for Baker from showing the witness Brooks his depositions for the purpose of establishing that testimony given by him at the trial was

never given by him at the preliminary enquiry as Brooks asserted. This matter was dealt with when we considered the submissions relating to the conduct of the trial. We said then that the judge was in error in not allowing Miss Walters to contradict Brooks. We deal now with the prejudice which it was said resulted. The evidence in question was the allegation by Brooks that when he was leaving the rotunda during the riot he met Baker running in with two machetes. It was suggested that the witness had not said this at the preliminary enquiry. If the deposition had been put in to contradict him on his statement that he had said it at the preliminary enquiry this, as we have said, would not have been conclusive of the fact that he had not said it. He might have said it and it was not written down in the depositions. We doubt, however, that this would have had any effect on the rest of Brooks' evidence that he saw Baker chopping the deceased. But it was contended that by the trial judge, in effect, preventing Miss Walters from contradicting the witness on this occasion it operated also in precluding her from showing Brooks his depositions to satisfy himself and the court that he never said at the preliminary enquiry that he saw Baker chop the deceased. No attempt was in fact made to get the witness to make this admission. We do not know what would have happened if the attempt had been made. The witness may well have admitted it. Other attorneys had succeeded in getting admissions from other witnesses of things they had not said and names they had not called at the preliminary enquiry without hindrance from the judge. In the circumstances, we do not see how we can be expected to say that the judge was at fault and that the applicant was prejudiced as a result.

There was no substance in the other grounds argued on behalf of the applicant Baker. In particular, there was no merit in the complaint made on his behalf, and on behalf of all the other applicants, except Winston Brown, by Mr. Lee Hing that the learned trial judge wrongly withdrew the issue of provocation from the jury. We agree with the learned judge that there was no evidence fit for the jury's consideration on such an issue. We hold that nothing has been urged which would warrant interference with the conviction of Eaton Baker. His

application is accordingly refused.

The case against the applicant Winston White was equally overwhelming. All seven eye-witnesses implicated him. Blake, Smith, Miller, Anglin, Brooks and Green named him as chopping the deceased and Robinson placed him in the rotunda with a machete at the relevant time. Smith may be excluded as he was obviously not believed. Of the rest, Anglin, Brooks and Green said Winston White was the first to chop the deceased.

Apart from the grounds common to all the applicants which have already been dealt with, two matters were urged by Mr. Noel Edwards in support of Winston White's application. The first was that the trial judge failed to put the defence of the applicant properly or adequately. It was submitted that the applicant's defence was not properly put to the jury in a manner that would ensure their understanding and appreciation of the significance of the evidence. It was said that in a case as complicated and protracted as this was, the trial judge ought to have carefully examined and analysed the evidence with a view to assisting the jury in arriving at a logical and reasonable conclusion.

Winston White's defence, as disclosed in his statement at the trial, was simply that he was in his dormitory, he heard Blissett cry out for help as Miller and Tate were beating him, he saw prisoners rush from their dormitories to the rotunda with cutlasses, he was frightened and he broke a glass window, jumped through and ran to the police station where he surrendered himself. The judge gave a verbatim reminder of his statement to the jury. Most of the argument and points raised under this ground were, therefore, in respect of the way in which it was said the judge should have analysed and marshalled the evidence which implicated the applicant. The submissions, in our view, amounted to a contention that the trial judge should have argued the applicant's case to the jury. This was the applicant's attorney's duty and we have no doubt that it was well done. There was no such duty on the trial judge. It has been said time and again that it is no part of a judge's duty to refer to all the evidence or to mention all the points taken or which could have been taken and the comments made. If there was such a duty

on him, in a case such as this, there would be no end to the summing up. It was submitted, for instance, that the judge ought to have made a careful comparison and contrasting of the evidence of all the eye-witnesses because their evidence each in itself was mutually exclusive. It was said that the significance of this aspect was not discussed or treated by the trial judge as was vital for a proper evaluation of the case. We said earlier when dealing with a general submission to the same effect that there was no such duty on the judge. In a case of this magnitude, an almost endless permutation of the evidence of the witnesses, as each implicated each accused, would be involved. As we have said, the respects in which the various accounts differed were clear for all to see and could not have escaped the jury's attention and consideration. In our view, there is no merit in this ground.

The second matter urged on Winston White's behalf was that the verdict of the jury was unreasonable and/or unsafe. The main argument here was based on the premise that the witnesses Blake, Miller, Smith and Anglin were so discredited that the jury should have been directed to disregard their evidence entirely. It was said that since the jury clearly acted upon the evidence of Blake and Anglin (in convicting Johnson and Tyrell respectively) it was impossible to say whether Winston White's conviction was based upon the acceptance of one or other of these witnesses; that it was also impossible to say to what extent the evidence of Miller and Smith caused his conviction. It was said, further, that it was impossible to say whether White's conviction was based exclusively upon the evidence of Brooks and/or Green or to what extent the jury might have been influenced in the acceptance of their evidence, if they did, by the acceptance of the evidence of the four who should have been discarded. We have said that the question whether or not these witnesses were discredited and, if they were, to what extent was properly left to the jury. It was for the jury to say whether they were prepared to act on the evidence of any or all of these witnesses (except Smith) supported as they were in respect of White and Baker by the evidence of Brooks and Green. That they seem to have adopted this approach is evidenced by the convictions of Tyrell and Johnson compared with the acquittal of Tony White and Glenis Stoner. We can

find no fault with this approach. In any event, it was open to the jury to disregard the evidence of the four and convict the applicants White and Baker on the evidence of Brooks and/or Green, whose evidence were sufficiently cogent. It was suggested that on comparison their evidence is mutually exclusive. There is, in our view, no real foundation for this suggestion, especially when account is taken of the fact that they spoke of seeing the events from Cornwall and Surrey dormitories respectively. In our view, on the evidence before the jury the convictions of Winston White and Baker was inevitable. There is no merit in Winston White's application, which is also refused.

Lastly, there is the application of Alphonso Phipps. Evidence was given by Blake and Green that he chopped the deceased. These were the only witnesses against him. Mr. Horace Edwards argued for him that the verdict of the jury convicting him is manifestly unsafe. The argument was similar to that of Mr. Noel Edwards. On the basis that Blake's evidence should have been discarded completely, it was submitted that the failure of the trial judge to deal adequately with Blake left his evidence in such a way that the jury could have believed him and have used his evidence as sufficient by itself to convict Phipps; or they could have used his evidence to disbelieve Phipps or to make Green's evidence more believable or as corroborating him. The answer to this argument is the same as that suggested in dealing with the similar argument put forward by Mr. Noel Edwards. Then the quality of Green's evidence was attacked by comparing it with the evidence of Brooks and of Dr. Black, who performed the post mortem examination on the body of the deceased. In our view, there is no substance in this argument.

The other ground argued for Phipps was that the trial judge failed properly to direct the jury as regards the defence and tended to limit the case for the defence to the statement of the applicant and the answers in reply to counsel for the applicant. A part of the argument under this ground is based on evidence given by the witness Smith, whom the jury did not believe, which it is said was favourable to

Phipps. Nothing more need be said about this. We have carefully examined the other points urged in support of this ground and can find no merit in them. Green's evidence alone was sufficient to sustain Phipps' conviction. There is also no merit in his application, which is refused.

The applicants Baker and Tyrell also applied for leave to appeal against the sentence of death imposed on them on the ground that they were under the age of eighteen years when the offence was committed. They were precluded by the recent decision of this Court in Martin Wright v. R. (February 4, 1972 - unreported) from arguing this ground before us.

To sum up, the applications for leave to appeal against conviction by Baker, White, Tyrell and Phipps are refused. So are the applications of Baker and Tyrell against sentence. The convictions and sentences in these cases are affirmed. The applications of Johnson and Brown are ~~allowed~~ granted. Their applications are treated as appeals. The appeal is allowed in each case, the convictions are quashed and the sentences set aside.

"HIS LORDSHIP: Just wait please. Tell me something, at Brown's Town when you refer to the six, what were the six doing?"

A. Chopping Warder Tate, sir, the six.

HIS LORDSHIP: The six that you mention at Brown's Town?

A. Yes, sir.

HIS LORDSHIP: The six you mention at St. Ann's Bay?

A. Chopping Warder Tate.

HIS LORDSHIP: The six you mention today, what were they doing?

A. Chopping Warder Tate, sir."

In subsequent cross-examination he admitted that among the six names he called at Brown's Town were the names of Griffiths and Lloyd Davis who were not included in the six he called at the trial. He admitted that he did not call the names of the applicants, Winston White, Eaton Baker and Winston Brown among the six at Brown's Town. Blake gave as an explanation generally, and with specific reference to not calling White's name, that at Brown's Town the case was concerned with the wounding of Miller and not Tate. He said that then he was speaking of the wounding of Miller and no one asked him about Tate: that when he spoke about Tate, the clerk of the courts told him that it was just Miller they wanted to hear about.

Blake also admitted that at the preliminary enquiry at St. Ann's Bay (into the charge of the murder of Tate) he did not name Winston Brown among the six who chopped the deceased though Brown was then among the prisoners in the dock. His explanation for this omission, stated in re-examination, was that at the time he did not know - he did not remember Brown's right name. He was cross-examined on a statement he admitted giving to the police on the day following the riot. In it he said he named only three persons as chopping Tate. He agreed that in the statement he did not name either Winston White, Eaton Baker, Winston Brown or Alphonso Phipps. In re-examination he explained that the three persons he named in the statement were not the only persons he referred to. He said he called three names only because he knew the others by face but did not remember their names at the moment. At the time he was a patient in the hospital because of the injuries he had received.